

(2005) 02 KL CK 0027
In the High Court Of Kerala
Case No : Criminal A. No. 152 of 1998

Bhavsingh D. Rathod

APPELLANT

Vs

Asst. Collector of Customs

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 82, 83

Customs Act, 1962 — Section 108, 135A, 138B

Evidence Act, 1872 — Section 30

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 25, 28, 29, 30

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15

Citation : (2005) 2 ILR (Ker) 762 : (2005) 3 KLT 210 : (2005) 3 RCR(Criminal) 359

Hon'ble Judges : J.M. James, J

Bench : Single Bench

Advocate : C.C. Thomas, M.G. Karthikeyan, Nireesh Mathew, Joseph George, Niju Mathew and Stefphy John Attokaran, for the Appellant; C.S. Abdul Sammad, A.C.G.S.C., for the Respondent

Judgement

J.M. James, J.—Bhavasingh Rathod @ Bhavasinghbhai, the 4th accused in C.C.46/1992 on the file of the II Addl. Sessions Court, Ernakulam, has been found guilty u/s 20(b)(ii)(c), Section 25, Section 28, Section 29 and Section 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short "the NDPS Act" and also u/s 135A of the Customs Act, 1982, in short "the Customs Act" and therefore was convicted and sentenced to undergo rigorous imprisonment for 20 years and to pay a fine of rupees two lakhs, in default to undergo simple imprisonment for two years for the offences under the NDPS Act, except Section 30 thereof, for which no separate sentence has been imposed; and to undergo simple imprisonment for three years, together with a fine of Rs. 50,000/-, in default of payment of which to undergo further imprisonment for six months, for the offence under Customs Act. The substantive sentence were directed to run concurrently.

2. The main contentions of the learned counsel Mr. C.C. Thomas is that the conviction of the appellant is not legally sustainable as the conditions contained in Section 30 of the Indian Evidence Act has not been properly appreciated by the Trial Court.

3. The learned counsel Mr.P.S. Abdul Samad appearing for the prosecution submitted that though accused Nos. 1, 2 and 7 were not jointly tried with the accused, the statements recorded by the investigating officer(s) u/s 108 of the Customs Act and u/s 67 of the NDPS Act can be used as a piece of evidence against the accused u/s 138B of the Customs Act and u/s 53A(a) of the NDPS Act respectively. Counsel also submitted relying on the conduct of the accused, that he is a very influential person and, therefore, had prevented accused Nos. 1, 2 and 7 from being apprehended and CWs.6 and 11, the drivers, from being brought before the Court to tender evidence during the trial.

4. The brief facts required for disposal of this appeal, before entering into the question of law posed by both sides, are as follows:

The 3rd accused Kishore Singh met the 2nd accused Rameshdevji Shah, in connection with the export of cargo to USA. Both went to the residence of the 4th accused. All the three confided. Thereafter, accused Nos. 4, 5 and 6, along with another person called Kaka, hatched a criminal conspiracy for exporting Hashish to USA. In furtherance of that conspiracy, accused 2 and 3 went to Bombay and met the first accused, seeking assistance for shipping the consignment to USA. The latter agreed for the proposal. Accused Nos. 2 and 3 returned to the house of the 4th accused. The latter expresses his willingness to help the other accused and Kaka, in their efforts to transship the consignment of Hashish to USA. In furtherance of this conspiracy, accused Nos. 1 to 3 visited Kochi and met PW14 of M/s. Pillmen Agencies, for exporting Hashish to USA from Kochi. The first accused prepared the necessary documents to transship Hashish from Thane to Kochi and from Kochi to the United States of America. Accordingly, at the instruction of the first accused, Ext.P2 shipping bill was filled on behalf of M/s. Tharaporewala Engineers, Bombay, through M/s. Akhil Shipping Agencies, one of the customs house agents at Kochi, for export of the consignment to United States of America. Hundred bundles of galvanized steel fencing wire and 86 pallets of M.S.grills, were declared. The name of consignee was declared as M/s. Custom Metal Designers, Ohio, U.S.A. CWs. 6 and 11, drivers of Rajkot, Gujarat, had loaded the consignment in truck from the godown of the accused, and brought the same to Kochi and unloaded in the godown arranged by the 7th accused at Kochi. From there it was transported to Q7 shed at Ernakulam Wharf, on 1.11.1989. As the shipping bill was filed before the customs officials on 15.11.1989 at about 4.30 p.m. on 16.11.1989 the shipping bill was presented by the customs house agents before the Appraiser for examination of the cargo. The Special Investigation Branch of the Customs House, Kochi collected the shipping bill, along with other connected documents, for the export of the consignment for the purpose of detailed examination of the consignment, as they had some

suspicion regarding the genuineness of the cargo to be exported. Suspecting that Narcotic Drugs and Psychotropic Substances, were also concealed in the consignment, the presence of exporters were also sought for. On understanding that accused Nos. 1 and 2 were staying at Dwaraka Hotel, Ernakulam, and the 7th accused was at Good Shepherd Tourist Home at Ernakulam, PW.1 went to room No. 315 of Dwaraka Hotel on 16.11.1989 evening and met accused 1 and 2 and seized certain documents from their possession. PW.1 also met the 7th accused. He had also recorded the statements of accused Nos. 1, 2 and 7 u/s 108 of the Customs Act on the same day, 16.11.1989.

5. On 17.11.1989, the members of the Special Investigating Team of the Customs Department went to the Wharf where the consignment was stored. On detailed examination of the consignment, in the presence of accused Nos. 1,2,7 and also in the presence of two independent witnesses. Out of 86 pallets of M.S.Grills, 74 pallets were containing one metal box each. When these metal boxes were opened, it contained slabs of Hashish. In all, 2404 slabs having a total weight of 1165.1 Kgs. were found hidden. PW1 seized the same under Ext.P25 mahazar. Samples were also collected as per law and sent for chemical analysis. Exts. P24, P27 and P39 statements of the first accused were recorded respectively on 16.11.1989, 19.11.1989 and 28.11.1989. Exts.P28 and P40 statements of the 2nd accused were recorded respectively on 19.11.1989 and 28.11.1989. All these three accused, i.e., accused Nos. 1, 2 and 7, were arrested on 20.11.1989. They were remanded to judicial custody by the Judicial First Class Magistrate Court, Ernakulam. While they were under judicial detention, they were taken into custody, for serving the term under the Conversion of Foreign Exchange and Prevention of Smuggling Activities Act in short "COFEPOSA". They were shifted to Central Jail, Thiruvananthapuram. After serving the period under the COFEPOSA they were released. Thereafter, accused Nos. 1, 2 and 7 were absconding.

6. As the accused could not be apprehended, coercive steps including under Sections 82 and 83 Cr.P.C. were taken. Meanwhile, the accused got elected to Gujarat Legislative Assembly in the year 1996. When the steps reached the authorities in Gujarat and the attempt to quash the proceedings initiated by the customs officials against him, then pending as C.C.46/1992 before the Sessions Court, Ernakulam, failed, the 4th accused surrendered before the Court on 16.8.1996 and was remanded.

7. PW.19 filed complaint against accused Nos. 1 to 7 before the Sessions Court and the Court took cognizance of the same as C.C.46/1992. The 4th accused faced trial. The prosecution examined PWs.1 to 19 and marked Exts. P1 to P75. MOs. 1 to 98 were also identified. Though there was no oral evidence on the side of the accused, Exts. D1 to D8 were marked. It was after appreciating this evidence that the learned Sessions Judge convicted and sentenced the 4th accused, the appellant herein, as stated above. The same is under challenge through this appeal.

8. For clarity of discussion, I shall reproduce below Section 30 of the Indian Evidence Act.

"30. Consideration of proved confession affecting person making it and other jointly under trial for some offence.-- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustration

Explanation.- "Offence" as used in this section, includes the abetment of, or attempt to commit the offence.

(a) A and B are jointly tried for the murder of C. It is proved that A said - - "B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said -- "A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried".

9. Analysing Section 30 of the Evidence Act, the Apex Court in Kalpnath Rai Vs. State (through CBI), , laid down three conditions, viz., (i) there should be a confession of inculpatory nature; (ii) the maker of the confession and the co-accused should necessarily have been tried jointly for the same offence; and (iii) the confession made by one accused should affect him as well as the co-accused; meaning that the confessor cannot absolve himself from the offence and involve the co-accused in it while making the confession.

10. In the case at hand, admittedly, accused Nos. 1, 2 and 7 had not been tried along with the appellant. During the hearing, the learned counsel for the appellant submitted that the 7th accused has been arrested and he is facing the trial. However, the fact remains that accused Nos. 1, 2 and 7 had not been jointly tried with the appellant. The obvious question of law is, whether the confession statements, as discussed above, recorded from accused Nos. 1, 2 and 7, as well as the statements of CWs. 6 and 11, recorded u/s 108 of the Customs Act, could be made use of against the appellant, who faced separate trial of this case.

11. The learned trial Judge had accepted the proposition contained in Bhana Khalpa Bhai Patel Vs. Assistant Collector of Customs, Bulsar, Gujarat and Another, , and came to the conclusion that the statements of these three accused as well as CWs. 6 and 11 could be accepted and acted upon against the appellant. But, this finding is seriously challenged by counsel for the appellant.

12. In Kashmira Singh Vs. State of Madhya Pradesh, the Supreme Court observed, with regard to the application of the confession statement against

other accused, as follows:

"The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing that without the aid of the confession he would not be prepared to accept".

This principle has been followed by a Full Bench of this Court in *State v. Ammini* 1987 (1) KLT 928 (FB).

13. In *Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar*, a larger Bench of the Apex Court quoted *Reilly, J.*, as reported in *Periyaswami Mooppan v. Emperor* AIR 1931 Mad. 177, as follows:

"...the provision of Section 30 of the Evidence Act goes not further than this, "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence..."

In *Haricharan Kurmi's* case the Court also held that a confession cannot be treated as a substantive evidence, against a co-accused person. The principle laid down in *Kashmira Singh's* case (*supra*) had been accepted by the larger bench in *Haricharan Kurmi's* case also. Thus, as the appellant was not tried jointly with accused Nos. 1, 2 and 7, the 2nd condition u/s 30 of the Evidence Act, laid down in *Kalpanath Rai v. State*, cited above, is not available for the prosecution.

14. Emphasis has been made by the prosecution that apart from the confession statements of accused Nos. 1 and 2 and 7, as discussed above, the evidence available to connect, the appellant is the statements recorded by PW1 from CWs. 6 and 11, the drivers. According to CWs. 6 and 11, the materials were loaded from the godown of the appellant at Rajkot and, on his instruction, they had transported the same to Kochi. Further, when CWs. 6 and 11, were stopped at Mangalore check post for payment of sales tax, they had contacted the first accused in Dwaraka Hotel and informed him of the matter. Thereafter, accused Nos. 1 and 2, in turn contacted the appellant as could be seen from Exts.P65, P67 and P70 ledgers maintained by Woodlands Hotel and Dwaraka Hotel, where accused 1 and 2 were staying. Learned counsel for the accused argued that being a local MLA and influential person, if, at the time of an emergency, accused Nos. 1 and 2 contacted the appellant and sought his advice, the same cannot be considered as an incriminating circumstance connecting the appellant with the crime. The evidence show that the telephone number in which accused 1 and 2

had contacted is in the name of the wife of the appellant. But, there is no clear evidence to the effect also. However, the learned counsel Mr. Abdul Samad gave emphasis to the confession statements of accused Nos. 1, 2 and 7 as well as the statements of CWs. 6 and 11.

15. I have already discussed the principle, as laid down by the Apex Court, that a confession made by one accused is not a substantive evidence against a co-accused. In Kashmira Singh's case (supra) it has been clearly laid down that the Judge has to appreciate the evidence against the accused, excluding the confession altogether from consideration and has to see whether he could believe that evidence and conviction could safely be based on it. But, if the Judge is not prepared to act on that evidence, and even if believed, it is necessary to look for further evidence, then alone the Judge may call in aid the confession statement of a co-accused and use the same to "lend assurance to the other evidence and thus fortify himself in believing, without the aid of the confession, he would not be prepared to accept the evidence available against the accused. In Harichandran Kurmi 's case (supra) also, the larger Bench of the Apex Court, quoted with approval, the observations of Reilly, J. In Periyaswami's case (supra), where it was held that a confession described in Section 30 of the Evidence Act may be thrown into the scale as an additional reason for believing the existing evidence against the accused. In the case at hand, I do not find any convincing evidence by which the prosecution has proved, as per law, that the accused had committed the offence alleged against him. Therefore, not only that the case had not been jointly tried with the other accused, whose confessions have been relied on by the Court below, but also there is no independent acceptable evidence against the appellant.

16. In Bhana Khalpa Bhai Patel's case (supra), which was relied on by the lower court, the 8th accused therein challenged this conviction and sentence before the Apex Court in appeal. Earlier, the 9th accused in that case had pleaded guilty before the lower court and he was, therefore, convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2,000/-. He suffered the sentence and, on remission of the sentence, was, later on, released. During the trial of the 8th accused, this 9th accused, who pleaded guilty, was cited and examined as PW27. The confession statement given by PW27 before the investigating officer was relied on by the Trial Court. There was also other acceptable evidence against the 8th accused. The confession statement and the oral evidence of the 9th accused were accepted in addition to the other evidence adduced by the prosecution. It was also proved that PW27, the 9th accused, was the driver of the 8th accused. The Apex Court, therefore, refrained from interfering with the conviction of the 8th accused and the sentence imposed on him. In the case at hand, there is no material to connect the accused Nos. 1, 2 and 7 with the appellant as they were not in joint trial with the appellant. The facts are entirely different and, therefore, Bhana Khalpa Bhai Patel's case is inapplicable in this case.

17. The learned Central Government counsel submitted that the statements of CWs.6 and 11 had been recorded by the Customs officials u/s 108 of the Customs Act and u/s 67 of the NDPS Act. CWs. 6 and 11 were not available for examination, despite the coercive steps taken against them u/s 138B of the Customs Act and Section 53(a) of the NDPS Act. In such circumstances, the involvement of the appellant cannot be brushed aside. Counsel also cited various instances of the influence exerted by the accused and submitted that he was the reason for preventing accused Nos. 1, 2 and 7 from getting arrested and also CWs.6 and 11 from appearing before the lower court and tendering evidence. There is no evidence adduced by the prosecution to show that the appellant had, in any way, prevented the officials from arresting accused Nos. 1, 2 and 7. There is also no material to show that the appellant had prevented CWs. 6 and 11 from appearing before the lower Court. Without examining CWs. 6 and 11 and making them to face the cross examination on behalf of the appellant, their evidence cannot be accepted against the- appellant at all. The learned Sessions Judge had gone wrong in applying the principles contained in Bhana Khalsa Bhai Patel's case in entering into a conviction basing on the confession statements of accused Nos. 1, 2 and 7, as well as the statements of CWs.6 and 11, recorded by the Customs Officials u/s 108 of the Customs Act and u/s 67 of the NDPS Act.

18. In Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, (in short "the TADA A") it is stipulated that notwithstanding anything contained in the Criminal Procedure Code or in the Evidence Act, a confession made by any person before the authorised police officer shall be admissible in the trial of such person or a co-accused, abettor or conspirator, for the offence under the TADA. It further contains that such a confession is admissible only as per the provision of that Section. An amendment, brought out in 1993, incorporating a proviso to Section 15, further stipulated that such an opportunity would be available for the prosecution only when the co-accused, abettor or conspirator is "charged and tried on the same case, together with the accused". This proviso, as well as the amendment to Section 15 of the TADA, came up for consideration of the Apex Court in Esher Singh v. State of Andhra Pradesh 2004 (2) KLT 23 at P. 16). The Apex Court, while interpreted Section 15, as amended, laid down that the expression "charged and tried" is that the use of confessional statement against a co-accused is permissible, when both the accused making the confessional statement and the co-accused, are facing the trial after framing of charges.

19. In Kalpanath Rai's case (supra), at paragraph 75, the Full Bench of the Supreme Court held that a confession made under the TADA can be used as against a co-accused in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act. But, in State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, , the findings at paragraph 75 of Kalpanath Rai's case had been overruled, per majority. In Esher Singh v. State of A. P. (supra) the decision in Nalini's case had been followed. Thus, the correct position of law is that Section 15 of TADA Act and the proviso

contained therein, are applicable only to the offence committed under the TADA Act, and the same cannot be made applicable to the provisions of the Customs Act or the NDPS Act. Section 30 of the Evidence Act alone shall be applicable for making use a confession statement of the co-accused, during their joint trial. Further, even if a statement had been recorded u/s 108 of the Customs Act, unless such witnesses are examined, Section 138B of the Customs Act or Section 53A(1)(a) of the NDPS Act cannot be resorted to.

20. In view of the above discussions, I hold that the learned Sessions Judge has not applied the principle of law, as repeatedly laid down by the Apex Court, particularly, the application of Section 30 of the Evidence Act, in the correct perspective. The prosecution had failed to prove any offence, as required by law, against the appellant. When the facts and law are thus appreciated, I further hold that the accused/appellant is not guilty of the offences alleged against him, either under the NDPS Act, or under the Customs Act.

21. In the result, the accused is acquitted of all the charges alleged against him. He be released and set at liberty forthwith, if he is not required or wanted in connection with any other case.

22. The accused, though was housed in Central Prison, Thiruvananthapuram, on a mutual arrangement between the Government of Kerala and the Government of Gujarat, as per Government order under GO(Ms) 96/99/Home B dt. 14.6.1999, he had been transferred to Sabarmathi Central Jail, Sabarmathi, Ahmedabad.

Hence communicate forthwith a copy of this judgment to the accused through the Superintendent, Sabarmathi Central Jail, Sabarmathi, Ahmedabad-380 005.